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The *Access to Information Act* and Cabinet confidences

A Discussion of New Approaches

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Appendix A

The *Access to Information Act* and Cabinet confidences A Discussion of New Approaches

I. Introduction

The *Access to Information Act* has operated for almost 15 years in Canada to help make government more open, understandable and accountable to the citizenry. It established a "right to know", set standards for what the government could legitimately keep secret and affixed to a Westminister-style government a system of review of refusals of access which is independent of government. The effectiveness of access rights, however, depends upon the classes of records which are not accessible. There are troubling gaps in the coverage of the *Access to Information Act*. In fact, in terms of the comprehensiveness of its coverage, the *Access to Information Act* is very much behind the times. This report examines what is arguably the major gap in the law's coverage — Cabinet confidences.

Cabinet confidences that have been in existence less than twenty years are generally excluded from the coverage of the *Access to Information Act*. Subsection 69(1) provides that the Act does not apply to confidences of the Queen's Privy Council for Canada, including:

> (*a*) memoranda the purpose of which is to present proposals or recommendations to Council;
>
> (*b*) discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
>
> (*c*) agenda of Council or records recording deliberations or decisions of Council;
>
> (*d*) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
>
> (*e*) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (*d*);
>
> (*f*) draft legislation; and
>
> (*g*) records that contain information about the contents of any record within a class of records referred to in paragraphs (*a*) to (*f*);[1]

[1] For convenience in this document confidences of the Queen's Privy Council for Canada will be referred to as Cabinet confidences and the

The term "Council" is defined in the Act to mean the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet. This is taken to cover the standing committees, ad hoc committees and any other committee of ministers, including informal meetings between or among ministers, provided that the records created concern the making of government decisions or the formulation of government policy.

The fact that Cabinet confidences are excluded from the *Access to Information Act* means that the access rights conveyed by that legislation do not apply to these types of records, including the right of review by the Information Commissioner or the Federal Court of decisions to deny requests for such records. If the government decides that a requested record must remain secret because it is a Cabinet confidence, no independent review of this determination is available.

The only exceptions to this general rule are:

- Cabinet confidences which have been in existence for more than twenty years and which become subject to the provisions of the Act (it should be noted that this does not mean that they will be released to an applicant if another exemption under the access legislation applies to them) [paragraph 69(3)(*a*)]; and

- discussion papers:

  - if the decisions to which the discussion papers relate have been made public; or,

  - if the decisions have not been made public, after four years have passed since the decisions were made. [paragraph 69(3)(b).]

The decision to exclude Cabinet confidences from the coverage of the *Access to Information Act* was made at the eleventh hour (June, 1982 as a parliamentary session was closing) by a nervous Trudeau Government which sought to protect the essential processes of Cabinet and parliamentary government while proceeding with access legislation. However, the conversion of the strong, mandatory class exemption for Cabinet confidences that had been originally drafted into an outright exclusion from the coverage of the Act served as a lightening rod for criticism which brought the legislation into some disrepute even before it was proclaimed in July, 1983.

Dubbed the "Mack Truck" clause by the Opposition and media alike, the exclusion of Cabinet confidences was immediately fastened on as evidence that the Trudeau Liberals, long in power and with many secrets to keep, had brought forth a secrecy law camouflaged in the language of openness.

Queen's Privy Council for Canada, in all its various forms, as either Council or Cabinet.

Three years after the law came into force its operation was reviewed by a parliamentary committee. Despite prudent administration of the exclusion through the Privy Council Office (PCO) to maintain a fairly limited interpretation of what actually qualified as a Cabinet confidence, the Standing Committee on Justice and Solicitor General heard more testimony on the need to reform this provision than on any other issue.[2] The Committee found many compelling reasons for protecting "Cabinet confidentiality" but went on to state in a unanimous report that:

> . . . the Committee does not believe that the background materials containing factual information submitted to Cabinet should enjoy blanket exclusion from the ambit of the Act (sic.). It is vital that subjective policy advice be severed from factual material found in Cabinet memoranda . . . . (But) factual material should be generally available under the Act — unless, of course, it might otherwise be withheld under an exemption in the legislation.[3]

The Mulroney government, which responded to the report of the Standing Committee, did not agree to make any amendment to end the exclusion of Cabinet confidences, despite the number of briefs recommending reform, the unanimous call for reform from Committee members and the suggestion from then Justice Minister John Crosbie that:

> . . . I think that in the past too much information was said to be covered by the principle of Cabinet confidence . . . . A lot of information previously classified as Cabinet confidence can and should be made available.[4]

In any event, no legislative amendments resulted from the parliamentary review of the *Access to Information Act*. Now, a decade later, there are rumblings that reform of the legislation is being considered by the government. There is little doubt that if this occurs there will be a great deal of pressure to reform the treatment of Cabinet confidences under the legislation. Since section 69 is no longer an accurate representation of the Cabinet Papers System (this is discussed in detail below), amendments to this section are likely. This study concludes that the approach of excluding Cabinet confidences, which was criticized in 1982 and demonstrated not to be the direction that other jurisdictions were adopting in 1986-87, appears absolutely shop worn in 1996. Most provincial freedom of information legislation has chosen to include a

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[2] See House of Commons, Canada, *Open and Shut: Enhancing the Right to Know and the Right to Privacy*, Report of the Standing Committee on Justice and Solicitor General on the Review of the *Access to Information Act* and the *Privacy Act*, (Ottawa, 1986-87), p. 31.

[3] *Ibid.*

[4] *Ibid.*

mandatory exception for Cabinet confidences, rather than exclude them from the coverage of their respective acts, and the result has not had an negative impact on the effectiveness of the collective decision-making of these Cabinets. The provincial models will be instructive in considering reform at the federal level of section 69. Indeed, it is the purpose of this paper to draw from the available experience in other jurisdictions in order to offer informed suggestions of reform in this area.

To that end, the report:

- examines the bases for providing confidentiality to Cabinet confidences;
- reviews federal policy and practices currently in place to deal with Cabinet confidences;
- compares and contrasts some critical appraisals of the definition of Cabinet confidences for access to information schemes with legislated provisions, policies and practices in place in three provincial jurisdictions — namely, Ontario, British Columbia and Alberta — which have modern access legislation in place; and
- provides some suggestions for the structuring of exemption criteria which adequately protects the federal Cabinet system of government while including Cabinet confidences within the scope of the *Access to Information Act*.

II. Basis For Protecting Cabinet confidences

The federal policy regarding *Confidences of the Queen's Privy Council for Canada* provides the following rationale for protecting Cabinet confidences and for excluding them from the coverage of the *Access to Information Act*:

> The Canadian government is based on a Cabinet system. Thus, responsibility rests not in a single individual, but on a committee of ministers sitting in Cabinet. As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality. This rule protects the principle of the collective responsibility of ministers by enabling them to support government decisions, whatever their personal views. The rule also enables ministers to engage in full and frank discussions necessary for effective functioning of a Cabinet system of government.[5]

This explanation does not differ substantially from other documents which have considered the relationship between freedom of information legislation and

[5] Treasury Board Secretariat, *Access to Information Act: Policies and Guidelines*, (Ottawa, 1993), Confidences of the Queen's Privy Council for Canada.

Cabinet confidences, such as the report *Open and Shut* and the Ontario Royal Commission on Freedom of Information and Protection of Privacy (Williams Commission).[6] All see three justifications for the protection of Cabinet confidences:

- **Convention of collective ministerial responsibility**: This convention requires that each Cabinet member be accountable for government policy. Thus, at the Cabinet table, each minister should be free to exchange frank and vigorous views with his or her colleagues and to have those views protected.

- **Need for candid advice from officials:** A corollary of the first justification is the need for ministers to receive candid advice from their officials. That is more likely to occur, it is believed, if advice to ministers is provided in confidence.

- **Confidentiality of Cabinet's agenda:** Finally, it is felt that Cabinet's agenda should be confidential. This will allow cabinet to set its own agenda and carry on discussion without undue political pressures being brought to bear. This type of confidentiality helps ensure that Cabinet decision-making processes are conducted in as expeditious a manner as possible.

While there is a significant degree of consensus on the need for some confidentiality of Cabinet confidences, there is much less consensus over just what needs to be protected. The Williams Commission puts it best:

> If it is obvious that the confidentiality of Cabinet deliberations must be preserved in a freedom of information scheme, it is less obvious how an exemption relating to this matter should be drafted. In particular, there is some uncertainty in the concept of "Cabinet documents." If this phrase includes not only those documents that are physically within the possession of Cabinet officials, but also documents that are prepared for eventual submission to Cabinet, the notion of "Cabinet documents" would extend far beyond the Cabinet decision-making processes into the files of the various ministries and other governmental institutions . . . .[7]

The Williams Commission was of the opinion that a more restricted definition of records containing Cabinet confidences (and, hence, a narrower scope of confidentiality) was appropriate for access to information legislation. We will return to this question of defining Cabinet confidences within an access regime after considering the current application of the federal exclusion for such

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[6] Province of Ontario, *Report of the Royal Commission on Freedom of Information and Protection of Privacy*, volume 2, Freedom of Information, p. 285.

[7] *Ibid.*

records.

III. Current Federal Policy and Practices

1. Background and Overview of Cabinet confidences Policy

The federal approach to Cabinet confidences was being put in place just as the Williams Commission was completing its work. It was very different from the Ontario recommendations. The original federal *Freedom of Information Act*, Bill C-15, drafted during the short-lived Clark government, had incorporated a mandatory exemption for Cabinet confidences, which permitted release of records containing background information, analyses of problems or policy options submitted or prepared for submission by a Minister of the Crown to Council for its consideration after a decision had been made by Cabinet with respect to a particular matter if no other exemption applied. This was as liberal as the federal drafters were to become.

The Trudeau Liberal version of the *Access to Information Act*, which emerged as Bill C-45, eliminated this provision and established a broad, class-based exemption. There was no injury test, but rather an exemption for all information that qualified as a Cabinet confidence. A list of records that would qualify as confidences or would contain confidences was provided:

- memoranda to Council;
- discussion papers presenting background explanations, analyses of problems or policy options to Council;
- agenda and records of deliberation or decisions of Council;
- communications and discussions between ministers for the purpose of making government decisions or formulating government policy;
- briefing records for ministers in relation to matters that are before or are proposed to be brought before Council or reflect the communications or discussions referred to above;
- draft legislation; and
- records that contain information about any record within the classes of records referred to above.

The only exception to the exemption was that such records ceased to be treated as Cabinet confidences after they had been in existence more than 20 years. Intense criticism during the committee hearings of the Standing Committee on Justice and Solicitor General on Bill C-45 led to the adoption of a government amendment relating to discussion papers. It was felt by members of the

committee that discussion papers could be moved out of the realm of Cabinet confidences after the decisions to which they related had been made public or a suitable amount of time had passed. The resulting amendment is reflected in paragraph 69(3)(*b*) which provides that the current exclusion does not apply to:

> . . . discussion papers described in paragraph (1)(*b*)
>
> (i) if the decisions to which the discussion papers relate have been made public; or
>
> (ii) where the decisions have not been made public, if four years have passed since the decisions were made.[8]

All this was to no avail, however, as indicated above, the Trudeau government got cold feet and made the exclusion of Cabinet confidences the price Parliament must pay for the passage of the rest of the *Access to Information Act* in June, 1982.

The administration of Cabinet confidences in relation to the *Access to Information Act* is carried out under a policy established by the Privy Council Office and issued, with other ATIP policy, by the Treasury Board Secretariat. This policy makes it very clear that neither the access rights nor the review procedures of the *Access to Information Act* apply to Cabinet confidences. It then goes on to establish the need, in policy not law, for government institutions to respond to requests from individuals that may involve Cabinet confidences and establishes a mechanism, under the coordination of PCO, for reviewing records to determine if all or part of a record contains Cabinet confidences.

Whenever it is determined that all or part of a record contains Cabinet confidences, access to the information is refused to an individual on the basis that the record is excluded under section 69 of the Act. While a dissatisfied requester has the right to complain to the Information Commissioner, the right has little substance. The Information Commissioner is not entitled to view the excluded record (as he is in the case of exempted records). His only check on excessive use of the Cabinet confidence exclusions is to seek a certificate from the Clerk of the Privy Council that the record or a specific part a Cabinet confidence. This procedure was established by the first Information Commissioner, Ms. Inger Hansen, under the authority of section 36.3(1) of the *Canada Evidence Act*. Such certificates are similar to Australian practices under that country's *Freedom of Information Act*, where a minister or secretary of a department may issue a certificate that certain records meet particular exemption criteria. It must be stressed, however, that in Australia such certificates are reviewable by an independent authority.

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[8] Canada, *Statutes, Access to Information Act*, C. 111, 29-30-31 Elizabeth II.

The federal Cabinet confidences policy stresses that, with two exceptions, there is no discretionary power provided to an individual minister or government institution to make a Confidence accessible to the public. The power to grant access is available only to the Cabinet or to the Prime Minister. When the records contain confidences of former governments, access is governed through former prime ministers and ministers. The two exceptions when ministers may authorize the disclosure of records are:

- the record was used for or reflects communications or discussions between ministers on matters relating to the making of government decisions or the formulation of government policy [paragraph 69(1)(*d*)]; or

- the record contains briefing notes related to the above paragraph 69(1)(*e*).

In practice, however, ministers rarely waive Cabinet confidences and, when they do, they do so in close cooperation with PCO.

The policy also establishes the principle of severability for those records described in paragraph 69(1)(*g*) of the Act, that contain information about the contents of Cabinet confidences. If the reference to a Confidence can reasonably be severed from the record in which it is found, then the policy permits this to be done in order to allow the rest of the document to become subject to the Act.

2. Types of Records

In the main, the Cabinet confidences policy deals with the definition of records that qualify for the class of records known as Cabinet confidences.

Subsection 69(1) of the *Access to Information Act* provides a general protection for Cabinet confidences (which is not defined) and the seven examples provided in it do not restrict the generality of the class. Thus, other types of records may well qualify as Cabinet confidences. The policy makes this point but goes on to more fully describe the documents which are generally considered to be Cabinet confidences. There are seven basic types:

i) Memoranda

Paragraph 69(1)(*a*) refers to records of which the purpose is to present proposals or recommendations to Cabinet. This class of records is represented by memoranda to Cabinet and Treasury Board submissions. They are normally signed by a minister recommending the action proposed but may also be signed by the Secretary to the Cabinet or by a Secretary to a committee of Cabinet and still qualify for the class of records. Any document prepared for the purpose of presenting proposals or recommendations to Cabinet would qualify for the class of records called Cabinet confidences.

The class extends to drafts of memoranda and submissions from first to final. Even records drafted for the purpose of presenting proposals and recommendations to Cabinet but which were never actually presented to Cabinet are still a Confidence.

Having broadly included memoranda, submissions and other similar documents as Cabinet confidences, the policy then narrows the exclusion for attachments to such documents. The policy states:

> Material appended to a memorandum presented to Cabinet will not necessarily, independent of its attachment to that memorandum, be a Confidence. If a record was not prepared to present recommendations or proposals to Cabinet, but rather was prepared for a use unrelated to the Cabinet process, it is not itself a Confidence. For example, memoranda to Council may have as appendices newspaper clippings, tables of statistics, reports prepared for use within a department. These records in their original state are not confidences and they do not become confidences simply because they were attached to a memorandum and are thereby distributed to Cabinet or to ministers of the Crown for use in Cabinet deliberations.[9]

Once again, the policy is based on the purpose for which the attachments were prepared. If the purpose is other than presenting proposals or recommendations to Cabinet and it is not evident that the documents were used in Cabinet deliberations, then they do not qualify as Cabinet confidences. On the other hand the analysis or background section of a memorandum to Cabinet does, under the policy, constitute a Cabinet confidence.

ii) Discussion Papers

Paragraph 69(1)(*b*) refers to discussion papers. This type of document is not often part of Cabinet Papers now. It was used in the past to present background explanations, analyses of problems or policy options to Cabinet for consideration by Cabinet in making decisions.

To the extent that discussion papers included recommendations or proposals, they could slip over to being the types of documents described in paragraph 69(1)(*a*). For those that remained true discussion papers, the rules in paragraph 69(3)(*b*) apply. They are no longer considered a Confidence after the decision to which they relate has been made public or four years have passed.

The discussion paper seems to have been largely abandoned in the Cabinet Paper System in favour of "Analysis and Background" sections in memoranda to

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[9] Treasury Board, *Access to Information Policy and Guidelines*, confidences of the Queen's Privy Council for Canada.

Cabinet. This was done, in the main part, to streamline the Cabinet decision-making process. An ancillary objective may have been to present these types of records from becoming accessible under the *Access to Information Act.*

iii) Agenda and records of Cabinet deliberations

Paragraph 69(1)(c) refers to agenda of Cabinet and to records recording the deliberations or decisions of Cabinet. Types of records which qualify here include agenda of meetings of Cabinet and committees, the minutes of any meeting of Cabinet and the records of decisions made in such meetings (e.g., Treasury Board decision letters). This includes drafts of these documents and any notes which officials may make of Cabinet or Cabinet committee meetings.

This class of record involves an important qualification. The policy makes a distinction between the text of a formal Record of Decision, which is a Cabinet confidence, and a summary or substance of the decision of Cabinet, which is often made public. As the policy states:

> . . . the formal text of the Record of Decision is always a Confidence and is excluded from the application of the Act. The substance of a decision reached by Cabinet may be disclosed to the public as deemed appropriate by the Cabinet or by a minister with the approval of Cabinet.[10]

A common example of this procedure is when the Treasury Board issues a circular or addition to a policy manual which incorporates the substance of a decision by ministers. Where a discussion paper is related to the decision, it ceases to be a Cabinet confidence and becomes subject to the provisions of the *Access to Information Act*, in accordance with paragraph 69(3)(*b*)(i).

iv) Records of communications between ministers

Paragraph 69(1)(*d*) deals with records used for, or reflecting communications between, ministers on matters relating to the making of government decisions or the formulation of government policy. Common forms of such records are letters between ministers setting out opinions or decisions and notes taken at meetings between ministers. The important factor here again is "purpose." The information must relate to the making of government decisions or the formulation of government policy. For instance, a letter between ministers discussing current government policy should not qualify as a Cabinet confidence under this provision.

v) Records to brief ministers

[10] *Ibid.*

Paragraph 69(1)(e) refers to briefing materials for ministers for matters that are before, or are proposed to be brought before, Cabinet. It also includes briefing documents concerning matters that are the subject of communications or discussions between ministers in regard to making government decisions or the formulation of government policy.

An important qualifier here is that the records must be for the purpose of briefing a minister in relation to matters before Cabinet or for use in a discussion with other ministers. If the record contains policy recommendations that were created independently of the Cabinet process, the records do not qualify as a Cabinet confidence even though the recommendations or advice may also be found in a record that does qualify as a confidence.

The policy provides as an example:

> . . . a situation where a formal Record of Decision directs a government department to develop policy recommendations for its minister on a particular subject. The officials in that department have meetings for which agenda are prepared, notes are made of proceedings and reports are developed to be the basis of subsequent discussions on the same subject. Although the ultimate purpose of the meetings and reports is to develop policy recommendations for the use of the minister in his or her presentation to Cabinet, the records themselves are not confidences. The records were created for the use of officials while they are developing policies, not for the use of the Minister (emphasis added).[11]

vi) Draft legislation

Paragraph 69(1)(*f*) covers drafts of proposed legislation, regardless of whether the legislation was ever introduced into the House or the Senate or, indeed, seen by Cabinet. In all cases, draft legislation is deemed to be a Cabinet confidence. This remains true even after the final version has been introduced into the House or the Senate and even after the final version has been passed and proclaimed in force.

vii) Records containing information about confidences

Paragraph 69(1)(g) refers to records that contain information about the contents of all the other categories of records containing Cabinet confidences. This is a broad provision which the policy circumscribes by indicating that the provision does not cover records which simply contain information that is also

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[11] *Ibid.*

contained in the above records. In order to qualify, the record must connect the information with the collective decision-making and policy formulation processes of ministers. By way of example, the policy states that:

> . . . if a record refers to certain statistics which are also found in a memorandum to Cabinet, this fact alone does not convert the first record into a Confidence. But if the first record refers to the fact that a memorandum to Cabinet contained the statistics, then that first record itself becomes a confidence.[12]

While the circumscribing of the nature of the records covered by the provision is important, it gives rise to extensive work in severing documents for partial release. The most common examples of Cabinet confidence information that appears in other records are references to Records of Decision and Treasury Board Numbers. While it is necessary to remove descriptive information about Cabinet deliberations or decision-making from records, the question remains as to what purpose is served by deleting numbers referring to Records of Decision or Treasury Board approval except that they fall within this broad class of record.

We will return to a consideration of the nature of the records which should be covered in a Cabinet confidences provision later in this report.

3. Current Cabinet Papers System

As indicated earlier, the current Cabinet Papers System does not completely parallel the types of documents described in section 69 of the *Access to Information Act*. This is troubling when exemption or, in this case, exclusion criteria are based on defined types of documents rather than being designed to protect a particular interest.

The largest discrepancy occurs with "discussion papers." The current Cabinet Papers System does not call for discussion papers. A memorandum to Cabinet is now more streamlined and comprehensive. Its structure is generally as follows:

- a set of ministerial recommendations. These are relatively short in nature (1 to 3 pages), and include an issue description, a rationale, and recommendations;
- a section on problems and strategies relating to the issue which defines why a particular option has been recommended;
- a section on political considerations;

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[12] *Ibid.*

- a section on departmental considerations which deals with issues raised by other departments during consultation of the memorandum at the bureaucratic level;
- a section on communications issues and a strategy or plan for addressing these;
- background and analyses of the issues involved and consideration of options for reform; and
- annexes and appendices which provide more detail on particular matters.[13]

The "Analysis and Background" section largely replaces the old discussion paper process. Its value in shedding light on the overall policy options that are open to ministers in their collective decision-making process has been recognized by the Order in Council of January 1, 1986, allowing the Auditor General to have access to analysis and background material in a memorandum to Cabinet after a decision has been taken. This procedure was put in place by the Mulroney government as a compromise solution to litigation brought by the Auditor General. He sought to obtain access to Cabinet documents of the Trudeau government relating to acquisitions made by PetroCanada in order to make an audit decision as to whether there was a sound basis for the acquisitions. As a result of the compromise, the Auditor General may now have access to any analysis or background material in a memorandum to Cabinet or Treasury Board submission where the Auditor General feels it is necessary in order to effectively audit the results of the decision or to report to Parliament on whether the government obtained value for the money expended as a result of the decision.

It should be noted that the Cabinet Paper System is controlled by PCO and Treasury Board submissions are controlled by the Treasury Board Secretariat. In the case of PCO, a coloured paper system is used, no copying of Cabinet Papers is permitted and the Papers must be returned to PCO after a particular meeting or discussion has taken place. Cabinet Papers are classified "Secret" while most Treasury Board submissions are designated "Protected."

The other major anomaly with the current section 69 provision is that it does not recognize that there may have been public or special interest consultation concerning the various options open to the government before a collective decision is made at Cabinet or one of its committees. This is particularly relevant in regard to draft legislation and regulations. Currently, the policy does not set out a process for dealing with requests for Cabinet confidences which may have been the subject of some type of public consultation. This gives rise to cases of inequitable access where some parties have been provided with the record during consultations and others who request access under the Act are denied.

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[13] Canada, Privy Council Office, *The Cabinet Paper System*.

IV. Other Approaches to Cabinet confidences

1. Australia

Australia was the only parliamentary democracy that was actively proceeding toward freedom of information legislation at the same time as Canada. Both countries had concerns about the impact of such legislation on Cabinet decision-making. Canada finally chose to exclude them from the right of access. Australia adopted a different, though still conservative, approach to protecting Cabinet documents but did include them in its *Freedom of Information Act.*

It is important to note at the outset, however, that though the Westminster tradition of Cabinet solidarity forms part of Australian political theory, it is perhaps less strong than in Canada. Cabinet ministers in Australia take an oath of secrecy and decisions in Cabinet are arrived at through consensus not by vote, thus avoiding many splits in the ranks. But ministers have often quoted from the Cabinet documents of predecessor governments and the Cabinet room can leak profusely. Thus a freer system than strict Cabinet solidarity seems to be the rule in Australia.

Subclause 34(1) of the Australian *Freedom of Information Act* provides that each of the following documents is an exempt document:

- a document brought into existence for the purpose of submission to the Cabinet which has been, or is proposed by a minister to be submitted to Cabinet;
- an official record of Cabinet;
- a copy or an extract from a document covered above; and
- a document, the discussion of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially disclosed.[14]

Like the federal Canadian approach, this is a broad class based exemption intended to cover specific types of Cabinet documents. There is no injury test. Once a document is determined to be of the class described, it is exempt.

Subclause 34(2) provides that a certificate signed by the Secretary to the Department of the Prime Minister and Cabinet certifying that a document is of the kind referred to in subclause 34(1) establishes conclusively that it is such a document. However, the question whether there are reasonable grounds for the claim that a document is exempt may be referred to the Ombudsman or the Administrative Appeals Tribunal, the two appeal mechanisms under the Act.

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[14] See Commonwealth of Australia, *Freedom of Information Act*, subclause 34(1).

Further subclause 34(3) provides that where a document is an exempt document because a particular part of the document contains matter that discloses deliberations within the Cabinet or a decision of the Cabinet, the certificate given in respect of the document must identify that part. The effect of this provision is that the document as a whole would remain an exempt document under subclause 34(1). If, however, it is practicable to delete the Cabinet references, access must be given to a copy of the document containing the remainder of the information, unless that information itself is exempt under another provision of the Act.

The term "Cabinet" is considered to include all its committees and similar provisions are made for certificates in regard to Executive Council documents (clause 35).

The Australian legislation also includes in its exemption for internal working documents, certain classes of documents to which access may be contrary to the public interest. (clause 36) Among these classes are:

- communications between ministers;
- communications between ministers and their Departmental and other advisers, including the briefing of ministers on Cabinet submissions; and
- drafts of Cabinet submissions.

A similar certificate process is in place where a minister is satisfied that disclosure of all or part of a document to which paragraph 36(1)(*a*) applies would be contrary to the public interest. The certificate establishes conclusively that all or part of a document is exempt so long as the certificate remains in force. However, the question of whether there are reasonable grounds for the claim that the disclosure of all or part of the document would be contrary to the public interest may be referred to the Administrative Appeals Tribunal for decision.

It is important to note that internal working documents are not automatically exempt under clause 36. To justify refusal of access to a document , the agency concerned must also determine that it would be contrary to the public interest to give access to the document and specify the ground of public interest involved. The clause recognizes that, within the broad range of documents defined as internal working documents, there will be many that can be made public without harm to the public interest. This is particularly true of background information of a factual nature or of documents which contain information that has already been made public.

A minister or his or her delegate must specify the ground of public interest on which the decision to refuse access is based.

Summary

Thus, the highlights of the Australian protection for Cabinet confidences are:

- broad, mandatory exemption of documents brought into existence for the purpose of a submission to Cabinet or the Executive Council;
- equal protection for official records of the Cabinet and the deliberations or decision-making process of Cabinet;
- some discretion to individual ministers and departments to decide whether or not to release draft Cabinet submissions and briefing materials for use by ministers in Cabinet;
- use of a certificate system to establish whether all or part of a document can be exempted as a Cabinet document or an internal working document which either contains materials about Cabinet decisions and deliberations or is a draft Cabinet submission; and
- independent review of the basis of the decision to issue a certificate exempting all or part of the document.

2. Ontario

i) The Williams Commission

The Ontario Royal Commission on Freedom of Information and Protection of Privacy undertook the most thorough review to date in Canada of this type of legislation. It was reporting just as the federal *Access to Information Act* was being drafted and put into place. The Commission took approaches to a variety of matters which were quite different from the federal model. Perhaps the most far-reaching was its decision to recommend the adoption of an Information and Privacy Commission which could make binding decisions on appeals under the legislation, (on the Quebec model), rather than the federal approach of an information ombudsman with a right of appeal to the courts. However, the Williams Commission's approach on Cabinet documents also differed markedly from the federal approach.

First, as noted earlier, the Commission affirmed its conviction that the notion of collective ministerial responsibility remained a vital part of the notion of Westminster-style, parliamentary government. In discussing the issue, the Commission assumed that Cabinet documents should form part of any scheme for freedom of information legislation *but* that it was also essential to preserve the confidentiality of Cabinet deliberations. The Commission then defined relatively narrowly what documents are in need of protection to preserve the confidentiality of Cabinet decision-making processes. In its view:

> . . . it is useful to assume, for definitional purposes, that Cabinet documents consist only of those documents that have been either generated by or received by Cabinet members and officials in the course of their participation in the decision-making processes. Thus described, Cabinet documents would include agendas, informal or formal minutes of the meetings of Cabinet committees or full Cabinet, records of decision, draft legislation, Cabinet submissions and supporting material, memoranda to and from ministers relating to matters before Cabinet, memoranda prepared by Cabinet officials for the purpose of providing advice to Cabinet, and briefing materials prepared for ministers to enable them to participate effectively in Cabinet discussions.[15]

In this way, the Commission sought to restrict its coverage of Cabinet documents to those records where disclosure would reveal the substance of deliberations of Cabinet.

The Commission Report then goes on to consider circumscribing these classes of records on three fronts:

a. Records of Decision

Consideration is given to the contention, which had been put forward in then draft Australian FOI proposals, that once a decision had been made, the immediate availability of the record of decision would be in the public interest. The Commission was not persuaded that this was good approach. It found many situations in which a Cabinet might have proper grounds for delaying the public announcement of a decision. Among the reasons for proper delay may be the need to:

- accommodate another government in its plans and actions;
- protect individuals until they have made preparations or certain events have transpired;
- plan for certain emergencies or put contingency plans into effect before public announcement; or
- respect the right of Parliament to announce major events in that forum.

For these reasons, the Commission rejected the idea of immediate release of Cabinet decisions after they have been made.

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[15] Williams Commission, vol. 2, p. 285.

b. Background annexes and appendices

The Commission had no doubt that background material attached to Cabinet submissions, which had been developed for departmental use and attached to a submission for information, should be routinely released. It found that release of such material was a common feature of all existing and proposed freedom of information legislation. The federal Australian FOI bill was quoted as proving

> . . . for the availability of such material by stipulating that the general exemption for Cabinet documents does not apply to a document simply by virtue of the fact that it has been submitted to the Cabinet for consideration, if it was not brought into existence for the purpose of submission for consideration by the Cabinet.[16]

The Commission was of the view that ministries might release this type of record at any time that a request was made, provided there was no indication that such records had been appended to a Cabinet document and no other exemption applied to them. However, it did not consider that the responsible Cabinet office should be required to disclose such records at any time prior to Cabinet deliberations based upon them.

c. Background and analysis prepared for Cabinet

The Commission was inclined to adopt the position taken by the drafters of the original federal FOI proposal, Bill C-15. It saw no merit in releasing background and analysis materials before the Cabinet decision-making process was completed. This, in the view of the Commission, would create "an undesirable pressure on the Cabinet to publicly respond quickly to enquiries concerning such material even though it may have not yet arisen for the consideration of Cabinet members".[17] However, after a decision has been made by Cabinet with respect to a particular matter, it believed that the reason for withholding disclosure lost its force. Thus, the Commission was in favour of the Bill C-15 wording as part of a Cabinet Documents exemption. This read that the exemption applied to "records containing background information, analyses of problems or policy options submitted or prepared for submission by a Minister of the Crown to Council for consideration by Council for making decisions but only before such decisions are made."[18]

The Commission viewed this as a reasonable limitation on Cabinet Documents exemption and supportive of the common government practice of making background information public when bills are introduced for parliamentary consideration.

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[16] *Ibid*, p. 286.

[17] *Ibid*, p. 287.

[18] *Ibid*.

Summary

Overall, the Commission recommended the an exemption for Cabinet Documents "whose disclosure would reveal the substance of Cabinet deliberations and, in particular, that the following kinds of Cabinet documents be the subject of this exemption:

- agenda, minutes or other records of the deliberations or decisions of Cabinet or its committees;
- records containing proposals or recommendations submitted, or prepared for submission, by a Cabinet minister to Cabinet;
- records containing background explanations, analyses of problems or policy options submitted or prepared for submission by a Cabinet minister to Cabinet for consideration by Cabinet in making decisions, before such decisions are made;
- records used for or reflecting consultations among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- records containing briefings to Cabinet ministers in relation to matters that are before or are proposed to be brought before Cabinet, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
- draft legislation."[19]

ii) Ontario *Freedom of Information and Protection of Individual Privacy Act*

Much of the Ontario FOI legislation follows the recommendations of the Williams Commission. This is the case for Cabinet Documents, where Section 12 of the Ontario *Freedom of Information and Protection of Individual Privacy Act* expresses the notion that the confidentiality of the Cabinet decision-making process is adequately protected through an exemption rather than an exclusion and then goes on to set out and refine the ideas of the Commission. The need to generally protect the decision-making or deliberative processes of Cabinet is set out in the section's preamble, which states:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of an Executive Council or its

[19] *Ibid.*

committees.[20]

The preamble indicates that the exemption is mandatory and not based on an injury test. It does not, as does the federal exclusion, refer to confidences of the Queen's Privy Council but rather to a record "where the disclosure would reveal the substance of deliberations of an Executive Council." Thus, attention is focused squarely on the contents of the record and what it reveals. The general nature of the provision means that a wide range of records or portions of records may qualify for exemption and the specific examples provided are simply that — examples. The fact that a record does not fit into one of the categories does not mean that a record is excluded from the application of subsection 12(1).

The specific examples are very similar to those of the Williams Commission. The focus remains on records reflecting Cabinet decision-making and the purpose for creating certain documents, i.e.: preparation for submission to Cabinet and relating to decision-making or the formulation of government policy. The categories are as follows:

- an agenda, minute or other record of deliberation or decisions of the Executive Council or its committees;
- a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
- a record that does not contain policy options or recommendations referred to in the above two categories and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
- a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultation among ministers relating to government decisions or the formulation of government policy; and
- draft legislation or regulations.

The refinements over the Williams Commission text are important:

[20] Ontario, *Statutes*, 1987, C. 25, section 12.

- In paragraph 12(1)(*b*), the more precise and relevant term "policy options" is chosen over the more general term "proposals."

- Clarification is provided in paragraph 12(1)(*c*) to assure that the records referred to do not contain "policy options or recommendations but rather background explanations or analyses of problems." This is done to assure the continued protection of "policy options or recommendations" while permitting the possible release of "background explanations and analyses" after the decision-making process is completed. This is the equivalent of drawing a distinction between the ministerial recommendations and background analysis portions of current federal memoranda to Cabinet.

- Paragraph 12(1)(*c*) also extends the requirement of the decision-making process from its simple completion through the decision of being made to it also being implemented. This change provides Cabinet with some continued flexibility in when it will announce or implement decisions without being rushed through the necessity to release documents under FOI.

- Paragraph 12(1)(*f*) extends coverage to draft regulations as well as to draft legislation. This recognizes the fact that regulations often undergo an equally intense drafting, consideration and redrafting process before Cabinet approval to assure that they reflect government policy. Draft regulations, with changes required, can provide insight on Cabinet or Cabinet committee deliberations and decision-making.

The Ontario Act then goes on to include two situations where the exemption in section 12(1) will not apply. In paragraph 12(2)(*a*), the drafters drew from the federal legislation and placed a time limit of 20 years on the protection of Cabinet records. In paragraph 12(2)(*b*), an exception is provided where:

> . . . the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.[21]

This paragraph provides the Executive Council, for which a record has been created or to which a record relates, the discretion to approve the disclosure of records that would otherwise qualify for exemption as a Cabinet record. The provision is intended to be used infrequently and cannot easily be resorted to by an applicant. The Ontario Information and Privacy Commissioner has suggested that one appropriate use of the provision would be when Cabinet records,

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[21] *Ibid.*

particularly draft legislation or regulations, have been disclosed to some parts of the public for purposes of consultation and there is an application under the FOI legislation to release the document.[22]

a. Disclosure in the Public Interest

It should be noted that the Ontario legislation contains an obligation to disclose records in the public interest (section 11) which does extend to Cabinet records. However, the public interest is restricted to records that reveal a grave environmental, health or safety hazard to the public.

The Ontario legislation also has a provision setting out a general public interest override for specific exemptions, but this excludes Cabinet confidences.

b. Restriction on Delegation

Subsection 56(2) of the Ontario legislation recognizes the special character of Cabinet records by restricting the Commissioner's ability to delegate his or her power to review a record alleged to be a Cabinet record. Such delegation may only be to an Assistant Information Commissioner.

Summary

On the whole the provisions of the Ontario *Freedom of Information and Protection of Individual Privacy Act* appear to be well balanced and thoughtful. In general, section 12:

- provides mandatory general protection for the confidentiality of the Cabinet decision-making process;
- maintains an effective but narrow interpretation of Cabinet records as being those that would reveal the substance of the deliberations of Cabinet;
- permits the disclosure of background and analyses submitted or prepared for submission to Cabinet after the decisions to which they relate have been made and implemented; and
- it provides a time limit to govern how long records will be considered eligible for the Cabinet records exemption and flexibility in statute for an Executive Council to disclose one of its Cabinet records.

The Orders of the Ontario Information and Privacy Commissioner relating to Cabinet Records indicate that section 12 is an effective provision in protecting

[22] Ontario, Office of the Information and Privacy Commissioner, *Orders*, Order P-771.

the confidentiality of collective decision-making in Cabinet. At the same time, it permits the release of other records that do not betray Cabinet deliberations, but do promote more accountability for the decisions actually taken by exposing the background and analysis on which they were based. Some highlights from the Ontario Commissioner's Orders relating to Cabinet Records follow:

- The introductory general wording of subsection 12(1) must be taken into account at all times. The appropriate way to read subsection 12(1) is to read the examples and determine if any apply. If they do not, it is still necessary to pose the question whether the "substance of the deliberations of an Executive Council" is being revealed. The records may be another example of Cabinet Records. For example:

  - briefing material may not actually "be before or be proposed to be brought before" an Executive Council as set out in paragraph 12(1)(e) but it will still reveal the substance of its deliberations;

  - background and analysis documents are not automatically available after a decision has been made and implemented if they would reveal the substance of deliberations of an Executive Council;

  - where a document relates to discussions between ministers to discuss government policy already formulated and implemented then it does not qualify as a Cabinet Record;

  - background material meant to update an Executive Council on events does not qualify for exemption as a Cabinet Record under section 12;

  - the mere title of a memorandum or the mention of a Cabinet submission without a description of its contents does not reveal the substance of the deliberations of an Executive Council and thus do no qualify for exemption under subsection 12(1).[23]

- The purpose for which a document was created is extremely important in determining whether all or part of it qualifies for exemption as a Cabinet Record under section 12(1):

  - obtaining numbers and crunching them into a series of figures is not background and analysis for purposes of paragraph 12(1)(c). There must be some interpretation and explanation and an indication that the document was submitted or prepared for submission to an Executive Council. As well, there must be an indication that the matter involved is either actively under consideration or clearly scheduled for consideration for the paragraph to apply. It can not be relied upon after a decision on the issue has been made and

[23] Ontario Information and Privacy Commissioner, *Orders*, Order #s 22, 40, P-304, P-323, P-483 and P-529.

implemented;

- a paper developed to provide background and analysis on an issue must clearly be related to a submission to the Executive Council. Too speculative and tenuous linkages or comments on very early drafts of a submission mean that records may not qualify for exemption under subsection 12(1);

- in rare instances, documents containing options and recommendations but no indication that they were prepared for or sent to an Executive Council may still qualify as Cabinet Records, if it can be demonstrated that they reveal the substance of deliberations in Executive Council; and

- a consultant's report, including public opinion research, which has been presented to a minister , included in a submission to an executive Council and used for the purpose of consultation among ministers of the crown on matters relating to the making of government decisions or for the formulation of government policy can qualify as a Cabinet Record for exemption under subsection 12(1).[24]

- Paragraph 12(2)(*b*) does not impose a mandatory requirement to seek consent of the Executive Council to release a document. There is no intent to change the way the executive Council operates. All that is required is that the head of a government institution must be mindful of the option in particular cases but its exercise the option unless conditions warrant it. Some criteria to bear in mind are:

  - the subject matter contained in the records;

  - whether or not the government policy contained in the records has been announced or implemented;

  - whether disclosure of the records would reveal the nature of deliberations or discussions or the position of a minister in Executive Council;

  - whether the records have, in fact, been considered by the Executive Council; and

  - are the records consultation drafts of legislation or regulations, where to protect them would lead to inequitable access on the part of members of the public and a question whether the records should

[24] *Ibid*, Order #s 60, 72, P-424, P-503, P-514, and P-771.

continue to qualify for mandatory exemption.[25]

3. Federal — *Standing Committee Report on Access and Privacy "Open and Shut"*

The federal parliamentary review of the *Access to Information Act* took a unanimous position that:

- the absolute exclusion of Cabinet confidences from the ambit of the legislation could not be justified as it undermined the credibility of the access statute;
- there is a need for a strong discretionary exemption protecting Cabinet records, since, to a substantial degree, the parliamentary system of government is predicated upon the free and frank discussion of matters of state behind closed doors;
- no injury test should apply to information qualifying as Cabinet records, and its coverage should be strengthened in recognition of the special nature of Cabinet government;
- it was inappropriate for even an office-holder directly accountable to parliament, such as an Information Commissioner, to be in a position to "second guess" a Cabinet decision concerning the release of one of its records. This power should be given to a very senior judge of the Federal Court of Canada. This was recommended in recognition of the increasing pivotal role that the courts were beginning to play in public affairs under the *Canadian Charter of Rights and Freedoms*. Even then, the court would only be able to judge whether or not the exemption had been properly applied and could not assess the merits of a claim concerning the potential injury arising out of the disclosure of all or part of a record; and
- the current paragraphs 69(*a*), (*b*) and (*e*), memoranda, discussion papers, and briefing documents, be deleted from a newly drafted exemption. Such records would be exempt only if their disclosure would reveal current discussions of Cabinet or its agenda and would qualify under the "advice and recommendations" exemption contained in section 21 of the *Access to Information Act*. This latter approach drew somewhat on the Australian FOI bill.[26]

The Committee recommended an exemption for Cabinet records along the following lines:

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[25] *Ibid*, Order #s 24 and P-278.

[26] *Open and Shut*, pp. 31-32.

> The head of a government institution may refuse to disclose a record requested under this Act where the disclosure would reveal the substance of deliberations of the Queen's Privy Council for Canada, contained within the following classes of records:
>
> (*a*) agenda of Council or records recording deliberations or decisions of Council;
>
> (*b*) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
>
> (*c*) draft legislation or regulations; and
>
> (*d*) records that contain information about the contents of any records within a class of records referred to in paragraph (*a*) to (*c*).[27]

The Committee further recommended that the twenty-year exemption status for Cabinet confidences be reduced to fifteen years, reflecting the maximum duration of three Parliaments, and that a special review structure for Cabinet records be established under the auspices of the Associate Chief Justice of the Federal Court.[28]

Summary

Open and Shut added several worthwhile dimensions to the ongoing debate over the coverage of Cabinet confidences within the federal *Access to Information Act*. It urged the adoption of an exemption rather than an exclusion. As well, the report emphasized the overlap between section 21 and any Cabinet confidences exemption. Finally, it offered the suggestion to reduce the time limit from twenty to fifteen years during which Cabinet confidences would be exemptible. Beyond this, the recommendations are, perhaps, less satisfactory than the provision in the Ontario legislation. There are several reasons for this contention:

- first, the exemption prepared by the Parliamentary Committee is discretionary rather than mandatory. This is out of step with legislative proposals made both before the report and since. A mandatory exemption is viewed as necessary to protect the special role which Cabinet plays in parliamentary government;
- second, the emphasis remains on specific classes of records as opposed to

[27] *Ibid*, p.32.

[28] *Ibid*, p.33.

the more generic and, ultimately narrowing, concept of "reveal the substance of deliberations" of Cabinet;

- third, there is no provision for a "public interest" override even, as in Ontario, for records dealing with grave environmental, public health and safety matters;

- fourth, no provision is made for eliminating protection for records containing background explanations or analyses of problems after decisions relating to the specific matters involved have been made and implemented by Cabinet;

- fifth, no provision is made for Cabinet consent to the disclosure of all or part of a record which has been prepared for it or in which it has an interest; and

- sixth, provision for taking any of the review process out of the hands of the Information Commissioner would be unduly restrictive in process and would hamper normal review and appeal procedures for applicants.

4. British Columbia *Freedom of Information and Protection of Privacy Act*

British Columbia gave considerable attention to Cabinet confidences in drafting its original freedom of information legislation, Bill 50, in 1991 and 1992. Coming late into the domain of freedom of information, the NDP government dedicated itself to developing state of the art freedom of information legislation. Bill 50 is interesting in that it sought to build on and improve the Ontario model in terms of promoting openness and more accountable government. At the same time, one of the major movers behind the B.C. legislation was T. Murray Rankin, one of the most knowledgeable commentators on freedom of information issues in Canada and the federal parliamentary review Committee's consultant and facilitator on ATI issues. As well, there existed in British Columbia, a public interest group, in the Freedom of Information and Privacy Association (FIPA) which lobbied the government hard to ensure that the views of the bureaucracy in regard to Cabinet confidences were countered. The result was an attempt to move forward from the Ontario model and incorporate specific recommendations from the federal review.

The resulting section 12 of the B.C. *Freedom of Information and Protection of Privacy Act* reads as follows:

(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

(2) Subsection (1) does not apply to:

(*a*) information in a record that has been in existence for 15 or more years,

(*b*) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or

(c) information in a record the purpose of which is to present background explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if

(i) the decision has been made public,

(ii) the decision has been implemented, or

(iii) five or more years have passed since the decision was made or considered.

Section 25 of the B.C. legislation goes on to make the public interest paramount by providing that whether or not an access request is made, the public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

- about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or
- the disclosure of which is, "for any other reason", clearly in the public interest, subsection 25(2) makes it very clear that this public interest override applies despite any other provision of the Act, including protection of Cabinet confidences.[29]

Upon complaint, decision-making about disclosure of all or part of a record that may contain Cabinet confidences lies squarely with the B.C.'s Information and Privacy Commissioner. The Commissioner may:

- require a public body to give the applicant access to all or part of a record, if the Commissioner determines that the head is not authorized or required to refuse access;
- confirm the decision of the public body or require the public body to reconsider it, if the Commissioner determines that the public body is

[29] See British Columbia, *Bill 50 - 1992, Freedom of Information and Protection of Privacy Act*.

authorized to refuse access; or

- require the public body to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access. [subsection 58(1).]

This provision permits the Information and Privacy Commissioner to determine whether or not section 12 has been applied appropriately but, since there is no discretion or injury involved with the exemption, there is very little room for comment in an order as to the merits of a claim of harm or injury arising out of disclosure. Thus, the Commissioner may comment on whether the Cabinet confidences provision applies, to a limited extent on the appropriateness of any severing that has been undertaken but not on the decision of the public body or Cabinet to properly invoke section 12 protection for Cabinet confidences.

Further paragraph 49(1)(*b*) prevents the Commissioner from delegating the power to examine Cabinet confidences.

The B.C. provision builds on the Ontario model. It contains:

- a mandatory exemption;
- no injury-based test but narrows the scope of the exemption by referring to "information that would reveal the substance of deliberations";
- examples of such information through a description of types of records (advice, recommendations, policy considerations or draft legislation or regulations) as opposed to Ontario's orientation to classes of records (agenda, minute, other record of deliberation, record containing policy options or recommendations, etc.);
- an emphasis on the purpose of the record (i.e., submitted or prepared for submission to Cabinet or its committees);
- a time limitation on Cabinet confidences, which adopts the federal Review Committee proposal of 15 years rather than Ontario's 20 years; and
- a limitation on protection of background explanations or analysis after a decision has been made public or implemented and extended to such records after five years after a decision has been made or considered, if it was not made public or implemented.

The British Columbia provision does not include the possibility of the Executive Council consenting to the release of a record that would otherwise qualify as a Cabinet confidence but section 25 of the *Freedom of Information and Protection of Privacy Act* does broaden substantially the grounds for releasing information contained in Cabinet records in the public interest.

Section 12 of the British Columbia provision remains a strong and reasonably broad exemption. If it is reasonable to assume that a release of information in a record would "explicitly or implicitly" reveal the substance of deliberations of Cabinet, then the information must not be disclosed. A release of information explicitly reveals the substance of Cabinet deliberations if the information itself contains the substance of Cabinet deliberations. A release of information implicitly reveals the substance of Cabinet deliberations if it is reasonable to expect that the released information could be combined with other information to reveal the substance of Cabinet deliberations. The information, by itself, may not reveal the substance of Cabinet deliberations.

The term "substance" is taken to have its normal dictionary meaning of essence, the material or essential part of a thing. "Deliberation" is taken to mean the act of deliberating, the act of weighing and examining the reasons for and against a contemplated action or course of conduct or a choice of acts or means.

The *Freedom of Information and Protection of Privacy Act Policy and Procedures Manual* lists the following records as qualifying for protection under section 12 of the Act:

- an agenda, minute or other record that documents the matters addressed by Cabinet (e.g., a list of issues tabled at Cabinet that reflects the priorities of Cabinet);
- a letter from Cabinet or a Cabinet committee that relates to the discussion or consideration of an issue or problem, or that reflects a decision made but not made public (e.g., a letter from Treasury Board to a ministry executive stating a decision that affects the ministry's budget but which has not been announced);
- a briefing note placed before Cabinet or one of its committees;
- a memo from a deputy minister to an assistant deputy minister in a ministry that informs them when Cabinet will consider an issue;
- a briefing note from a deputy minister to a minister concerning a matter that is or will be considered by Cabinet;
- a draft or final Cabinet submission; and
- draft legislation or regulations.

As at the federal level and in Ontario, British Columbia emphasizes that any list of types of information and records are examples only and are not intended to preclude other examples. The term "including" is intended to present some examples, but any information that would be presumed to reveal the substance of

Cabinet deliberations could be protected under section 12.[30] In defining "advice" and "recommendations," British Columbia policy indicates that it refers to the submission of a suggested course of action that will ultimately be accepted or rejected by its recipient during a deliberative process. Advice must contain more than mere information.

"Policy considerations" is taken to mean any information in a record that flags issues or other factors which Cabinet or one of its committees should consider when determining government policy.

"Submitted or prepared" for submission is taken to mean that the information went before Cabinet or one of its committees or that it was incorporated into a Cabinet submission or used as the basis for developing a Cabinet submission. Information that is reasonably expected to be placed before Cabinet or one of its committees qualifies for the purpose, although it may not yet have been considered. Records or information which might be incorporated into a Cabinet submission at some later date are not as easily justifiable as Cabinet confidences because the connection with Cabinet is so speculative.

Subsection 12(2), which sets out exceptions to the coverage of Cabinet confidences, makes clear that records that do not qualify for the protection of the exemption must be released unless some other exemption applies. A difference with the Ontario legislation occurs in paragraph 12(2)(*b*) where information in a record of a decision made by the Executive Council or any of its committees on an appeal under an act must be available to the public. The Cabinet confidences exemption does not apply. This recognizes instances where Cabinet may act as an appeal body whose decisions should be public. The exception does not extend to the portions of the record setting out the advice and recommendations used by the Cabinet to make its decision.

Paragraph 12(2)(c) establishes the basis for releasing "background explanations or analysis" after certain conditions are met. The purpose for preparing such documents must have been for presenting background explanations or analysis to Cabinet or one of its committees for consideration in making a decision. "Background" is taken to mean explanatory or contributory information which provides background to Cabinet deliberations. In British Columbia, these are usually attachments to a Cabinet submission. "Explanations" are taken to mean detailed information intended to make clear or intelligible a particular point or meaning. "Analysis" is defined as a statement of a detailed examination of the elements or structure of a scenario, issue, problem, or sequence of events.

Policy stresses that "background explanations or analysis" does not include information that would reveal the substance of deliberations of Cabinet or its committees. For instance, a summary of the background attachments in the body of a Cabinet submission which outlines the key implications that should

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[30] Province of British Columbia, Ministry of Government Services, *Freedom of Information and Protection of Privacy Policy and Procedures Manual* (Victoria, 1993), section C.4.2.

guide Cabinet decision-making would be considered as part of the substance of decision-making.

The conditions for not considering "background explanations or analysis" a Cabinet confidence are:

- where a Cabinet decision has been made public. That is Cabinet has made a decision on an issue or course of action and that decision has been communicated to the public in an authorized manner;
- where a decision has been implemented -- that is when officials begin the process of carrying out the decision of Cabinet; or
- five or more years have passed since a decision was made or considered. This covers situations where Cabinet either considered an issue but made no decision or did make a decision but neither implemented it nor made it public.

B.C. Commissioner's Views on Section 12

As of this writing, the Commissioner has made only one order. Order 33, which has dealt in any substantive way with the protection for Cabinet confidences in section 12. The interesting general points of interpretation it contains include:

- first, the Commissioner upheld a ministry contention that "background explanation or analysis" should not be excepted from the coverage of Cabinet confidences protection if it reveals the substance of deliberations of Cabinet;
- second, summaries of Cabinet decisions do not generally reveal the substance of Cabinet deliberations but the Commissioner is sceptical about severing the name of the minister recommending a particular course of action, even though it is was permitted in this case;
- third, notes of a meeting of the Premier's Council on Native Affairs, where members of the Cabinet Committee on native Affairs were present, does not qualify for exemption. The presence of members of a Cabinet Committee at another meeting does not automatically turn it into a Cabinet meeting;
- fourth, minutes of a joint meeting of the Cabinet Committee on Native Affairs and the Premier's Council on Native Affairs where substantive matters intended for Cabinet and a proposed recommendation to Cabinet were discussed should be withheld;
- fifth, summaries of Cabinet decisions should be disclosed; and

- sixth, Cabinet submissions and a Treasury Board Chairman's report qualify as Cabinet confidences, protected under subsection 12(1) of the British Columbia legislation.

Summary

It is fair to say that British Columbia made some improvements on the Ontario model. This is particularly true in regard to shortening the time period during which information in records can qualify a Cabinet confidence from 15 to 20 years. This is also true in regard to adding a time period of five years during which background explanations or analysis will be protected where the related Cabinet decision was made or considered but nothing was either made public or implemented.

Perhaps, the biggest difference between the protection offered Cabinet confidences in British Columbia as compared with Ontario lies in the decision of the former to broaden the public interest override in section 25 of its legislation from grave harm to the environment, public health and safety to significant harm to the environment, public health and safety and "any other reason that is clearly in the public interest." This would seem to both broaden the scope of this disclosure exception and lower the threshold to apply it.

Given these approaches, it is, perhaps, less obvious why B.C. chose not to include a provision which would have permitted Cabinet to consent to the disclosure of all or part of a record prepared for it or in which it has an interest that would otherwise be considered a Cabinet confidence.

5. Alberta *Freedom of Information and Protection of Privacy Act*

The Province of Alberta has followed the British Columbia example in setting up its provision for protecting Cabinet and Treasury Board confidences in section 21 of its *Freedom of Information and Protection of Privacy Act*. There are only two differences of structure and interpretation which reflect the particular Alberta government milieu. First, the provision refers equally to Treasury Board and its committees and to Cabinet and its committees, which reflects the important role of the Treasury Board in ministerial decision-making in Alberta. Second, the *Alberta Freedom of Information and Protection of Privacy Policy* makes clear that the protection for Cabinet confidences does not extend to Standing Policy Committees.[31] These are bodies unique to Alberta, where issues are sometimes directed to a policy committee of the governing party, chaired by a backbencher, for consideration either before they go to Cabinet or after first consideration by Cabinet. The records used by such committees may, if they have their origin with Cabinet, qualify as Cabinet confidences but most records created by these committees are specifically defined to be outside the scope of the FOIP

[31] Province of Alberta, Department of Public Works, Supply and Services, *Alberta Freedom of Information and Protection of Privacy Policy Manual* (Edmonton, 1995), section 3.5.10.

legislation (see *Alberta Freedom of Information and Protection of Privacy Act*, section 4(1)(l)).

Perhaps the most important factor in regard to the protection of Cabinet confidences in Alberta is that the draft FOIP legislation underwent extensive public consultation throughout the province under the auspices of an all party committee. Section 21 emerged as the unanimous approach recommended by the all-party committee for structuring exemption criteria for Cabinet confidences. The Policy Manual lists a number of types of records that would reveal the substance of deliberations of Cabinet and the Treasury Board or one of their committees. These are as follows:

- agenda, minutes and related documents of Cabinet meetings;
- letters and memoranda expressing issues deliberated and the decisions or directions taken by ministers but not made public sent to ministerial colleagues or senior public servants;
- briefing material, exclusive of background facts after the decision has been made public or implemented or five years have passed since the decision was made or considered, placed before Cabinet, Treasury Board or one of their Committees;
- a memorandum (including electronic mail) from the Secretary of the Cabinet to ministers discussing Cabinet decisions;
- a memorandum (including electronic mail) from a deputy minister to an assistant deputy minister or chief executive offer or other senior officers or among officials generally discussing issues that will or have been deliberated by Cabinet or the Treasury Board or one of their committees;
- a briefing note from a deputy minister or chief executive officer to a minister discussing what will be, is or has been discussed in Cabinet, Treasury Board or one of its committees, exclusive of background material if a decision has been made public, implemented or five years have passed since the decision was made or considered; and
- draft or final submissions to Cabinet or Treasury Board or one of their committees, exclusive of background explanations or analyses after a decision has been made public, implemented or five years has passed since the decision was made or considered.

Summary

The general comments about Alberta are the same as for British Columbia, since the legislation is the same. The Alberta legislation was only implemented in October, 1995 and, as yet, there are no Information and Privacy Commissioner's Orders relating to Cabinet confidences which can give an indication of how section 21 will be interpreted. It is interesting, however, that Alberta is providing guidance to public bodies to sever factual background explanations and analyses from Cabinet briefing materials for ministers if the decision to which it relates has been made public, been implemented or five years has passed since the decision was made or considered. This puts emphasis on practices of severance which have been employed in Ontario and British Columbia.

6. Chart Comparing Cabinet confidence Provisions

The attached chart, in Appendix A, entitled, "Comparison of Cabinet confidence Provisions" sets out a comparison of the treatment of Cabinet confidences under the *Access to Information Act*, the Ontario *Freedom of Information and Protection of Individual Privacy Act*, the proposals in the federal report *Open and Shut*, in the British Columbia *Freedom of Information and Protection of Privacy Act*, the Alberta *Freedom of Information and Protection of Privacy Act* and the Australian *Freedom of Information Act*. This chart summarizes the similarities and differences in approach in a more focused manner.

V. Conclusions and Recommendations

It is now time to turn to the recommendations for amendments which would amend the current federal approach of excluding Cabinet confidences from the coverage of the *Access to Information Act*. It is always problematic in making suggestions for appropriate provisions for dealing with Cabinet confidences. There is the need to maintain a delicate balance between the vital public interests of openness and government accountability and the need to protect confidentiality in the Cabinet process which permits the free and frank discussion of matters of state behind closed doors which is an essential part of the parliamentary system of government. The following recommendations encompassing a new approach to Cabinet confidences are offered to promote discussion and lead to appropriate and long overdue reform of section 69 of the federal access law.

1. Exemption or exclusion

The current federal approach to exclude Cabinet confidences from access legislation is out of step with other jurisdictions. A decade ago, the Standing Committee unanimously agreed it was time to replace the exclusion with an exemption. It also recommended that Cabinet confidences be brought under the independent review provisions of the Access Law. These recommendations

should now be acted upon.

Recommendation #1: That the current exclusion for Cabinet confidences in section 69 of the *Access to Information Act* be replaced by an exemption for Cabinet confidences, thus making these records subject to the access and independent review provisions of this act.

2. Mandatory or discretionary exemption

Most FOI legislation and proposals relating to the subject of Cabinet confidences view the vital nature of Cabinet confidentiality in a parliamentary form of government as meriting a strong mandatory exemption. The Standing Committee in its report, *Open and Shut*, suggested that the exemption for Cabinet confidences be discretionary. It is understandable that governments will be hesitant to weaken, to any significant degree, the protections for Cabinet confidences. If there is any likelihood of some change, the move to a mandatory exemption has more chance of acceptance. That would appear to be the lesson from provincial jurisdictions.

Recommendation #2: That any exemption dealing with Cabinet confidences be mandatory.

3. Injury test

The inclusion of an injury test would not, understandably, be acceptable to government. Having to convince an impartial officer (such as the Information Commissioner or the court) that disclosure would cause injury would put the government in an unprecedented situation of explaining political aspects of Cabinet deliberations to judicial officers. The chances of reform are remote if the recommendation is to include an injury test.

Recommendation #3: That any exemption dealing with Cabinet confidences not include an injury test.

4. Nature of class test

If the exemption is not based on an injury test, then it must be based on a class test. The crucial question: what should be the nature of that class test? The current exclusion is based on the concept of protection of confidences of the Queen's Privy Council for Canada, which are then partially defined in the Act and policy as being comprised of various types of records and information within records. The policy goes further to define some records or parts of records (e.g., public summaries of Cabinet decisions and records not prepared solely for use by Cabinet but attached to Cabinet records) as not being confidences. There is no description of the essential interest which the exclusion is intended to serve and, hence, the exclusion is open-ended.

With the exception of the federal legislation in Australia, this approach has not been followed in other jurisdictions. The preferred approach is to focus more clearly on the purpose of the exemption, the protection of the substance of deliberations of Cabinet, as the basis of the test. The phrase "would reveal the substance of deliberations of the Cabinet" is sometimes accompanied by a non-inclusive list of generic types of records or information which would qualify for the exemption. This latter approach has some considerable merit:

- it focuses the exemption and narrows it to the specific interest which requires protection. It eliminates the need for lengthy definitions of types of records which may qualify for the exemption and illustrations of exceptions to general rules. In other words, it is simpler, yet protects the vast majority of records, currently defined in the PCO policy on *Release of confidences of the Queen's Privy Council for Canada*, after its various exceptions are taken into account;

- it is more generic in character. As a result, would not suffer damage if PCO decides to alter the Cabinet papers process and the nature and types of records which are created;

- it does eliminate the need for government institutions to review and to sever from documents all simple references to Cabinet processes (e.g., RD numbers and TB numbers as is now the case). Such disparate references would only have to be removed when they actually revealed the substance of Cabinet deliberations.

Recommendation #4: That the test for a Cabinet confidences exemption be that the disclosure of a record would reveal the substance of deliberations of Cabinet.

5. Definition of Cabinet

All current and proposed exemptions and exclusions for Cabinet confidences extend to the Cabinet and all its committees, formal and "ad hoc." Thus, there is no need to alter the scope of the parts of Cabinet which may have records prepared for them, submitted to them or have records created on their behalf which would qualify as Cabinet confidences and merit protection.

Recommendation #5: That the current definition of the term "Council" in the *Access to Information Act*, which includes the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet, remain as in the current Act.

6. Coverage of exemption

The current federal exclusion is more restrictive than any exemption found in provincial laws. The major differences in practice centre on access to

background explanations and analyses after a decision has been made and on the reduced time limit for the application of the Cabinet confidences exemption.

The focus of any newly drafted exemption should be on records which are generated, or received by Cabinet members and officials while taking part in the collective process of making government decisions or formulating government policy. Generally, this includes:

- agendas, formal and informal minutes of Cabinet and Cabinet committees and records of decision;
- Cabinet memoranda or submissions (including drafts) and supporting materials;
- draft legislation and regulations;
- communications among ministers relating to matters before Cabinet or which are to be brought before Cabinet (including draft documents);
- memoranda by Cabinet officials for the purpose of providing advice to Cabinet (including draft documents);
- briefing materials prepared for ministers to allow them to take part in Cabinet discussions (including draft documents); and
- any records which contain information about the contents of the above categories, the disclosure of which would reveal the substances of the deliberations of Cabinet or one of its committees.

Examples should be included of types of records which "would reveal the substance of deliberations of Cabinet or one of its committees." The list, of course, should not be exhaustive so that the provision will be flexible in the face of future changes in the Cabinet papers system.

Recommendation #6: That the exemption provision for Cabinet confidences provide a non-inclusive, illustrative list of generic types of records which would qualify for protection.

Recommendation #7: That the list of examples be structured as follows:

(i) an agenda, minute or other record of the deliberations or decisions of Council or its committees;

(ii) a record containing policy options or recommendations submitted, or prepared for submission, to Council or its committees;

(iii) a record used for or reflecting communications or discussions among

ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

(iv) a record prepared for the purpose of briefing a minister of the Crown in relation to matters that are before, or are proposed to be brought, before council or that are the subject of communications or discussions referred to in (**3.**) above;

(v) draft legislation regulations; and

(vi) records that contain information about the contents of any record within the class of record referred to in paragraphs (*a*) to (*e*) if the information will reveal the substance of the deliberations of Council.

7. Splitting the protection of Cabinet confidences

The Australian FOI Act distinguishes between Cabinet and Executive Council documents and

- draft Cabinet submissions; and
- briefing material to a minister concerning a Cabinet submission.

These documents are treated under the exemption for internal working documents (clause 36) which determines whether a record can be considered, in whole or in part, to consist of advice and recommendations and whether access is contrary to a public interest. This means that a government institution has discretion to decide whether such information should be released.

The Standing Committee thought there was duplication in the protection of memoranda which present recommendations to Cabinet and for briefing materials used to prepare ministers for Cabinet meetings. It found that the discretionary exemption for advice and recommendation in section 21 of the *Access to Information Act* provides adequate protection for the deliberative portions of these types of records.

While, at first glance, this may seem to be the case, it is also necessary to keep in mind the special nature of the protection necessary for the collective decision-making process of government. Other legislatures in Canada, when considering the nature of this protection, have seen fit to split the treatment of Cabinet confidences into two domains, one mandatory and the other discretionary. This does not mean that the advice and recommendations exemption will not come into play when a record does not or ceases to qualify as a Cabinet confidence. The splitting of the treatment of Cabinet confidences would appear, however, to complicate decision-making around an already difficult exemption. Any use of discretion should be applied in the exception criteria for a Cabinet confidences exemption.

Recommendation #8: That the basis for exempting records or parts of records relating to Cabinet confidences be dealt within one exemption and not split between a Cabinet confidences provision and section 21, advice and recommendations.

8. Exceptions to Cabinet confidences exemption

There are a number of exceptions to the Cabinet confidences exemption recognized in the access laws of other jurisdictions and in various proposals for legislative amendment. These are considered below and recommendations made about each.

9. Time limits

Because of the class nature of all protection for Cabinet confidences, all other access statutes, except the Australian FOI Act, include a limit governing the period of time during which all or part of a record can be considered a Cabinet confidence. The original standard was 20 years (federal and Ontario). The federal Standing Committee recommended that the limit be reduced to 15 years, the length of time of three Parliaments. This standard has now been adopted in British Columbia and Alberta.

Recommendation #9: That the time limit for all or part of a record to be considered a Cabinet confidence be reduced from 20 to 15 years.

10. Background explanations and analysis

Early draft federal legislation and other considerations of appropriate protection for Cabinet confidences have suggested that background explanations and analysis presented to Cabinet should generally be accessible. Indeed, this is now a common feature of access legislation in many jurisdictions. Certainly, even the current federal policy governing the release of Cabinet confidence records indicates that background material that was not prepared for the purposes of a Cabinet submission but simply attached to it should not be excluded from the coverage of the *Access to Information Act.*

However, the proposition goes beyond this type of record to cover other background explanations and analysis prepared for Cabinet. After Cabinet has made a decision with respect to a particular matter, then this type of information loses much of its sensitivity and should not be considered as a Cabinet confidence. Ontario law provides that a record that does not contain policy options or recommendations, and does contain background explanations and analyses of problems submitted, or prepared for submission, to the Executive Council or its committees is not considered a Cabinet confidence after the decision is made and implemented. In British Columbia and Alberta, information in a record, the purpose of which is to present background explanations or

analysis to the Executive Council or any of its committees for its consideration in making a decision, is not considered a Cabinet confidence if:

- the decision has been made public;
- the decision has been implemented; or
- five or more years have passed since the decision was made or considered.

This exception for background explanations and analyses is considered crucial in opening up the information which forms the general basis on which Cabinet acted without exposing its deliberations. It is viewed as important to promoting improved government accountability and helping to assure that officials provide to Cabinet the best information on which to base decisions — since this, after all, will be open to review and comment.

The overwhelming acceptance in other jurisdictions that post-decisional background explanations and analyses be excluded from Cabinet confidence exemptions, makes it crucial that this matter be considered as part of any reform of the federal access law.

Recommendation #10: That any Cabinet confidences exemption include an exception for background explanation and analyses as follows:

The Cabinet confidences provision does not apply to information in a record not containing policy options or recommendations but which does contain background explanations or analyses of problems submitted, or prepared for submission, to Council or its committees for their consideration in making a decision if:

- the decision has been made public;
- the decision has been implemented; or
- four years or more have passed since the decision was made or considered.

The standard of four years is chosen since it is already in the federal access act in relation to the release of discussion papers, which the background and analysis section of Cabinet memoranda now largely replaces.

Recommendation #11: That any Cabinet confidences exemption except from its coverage any record or part of a record attached to a Cabinet submission containing background explanations or analyses which was not brought into existence for the purpose of submission for consideration by Cabinet or one of its committees.

11. Summary of decision

All governments summarize Cabinet decisions in order to communicate these to the public or allow government institutions to implement the directions of Cabinet. Not all such summaries are made available to the public in press releases or other similar public documents. Thus, there is a need to recognize that such summaries are not considered Cabinet confidences once they are severed from other information which may reveal the substances of deliberations of Cabinet or one of its committees. Such summaries (e.g., Treasury Board circulars implementing decisions relating a new policy or budget reduction) should be routinely available to the public.

Recommendation #12: That any exemption for Cabinet confidences include an exception for summaries of Cabinet decisions exclusive of any information which would reveal the substance of deliberations of Cabinet or one of its committees.

12. Cabinet as appeal body

From time to time, Cabinet or a Cabinet committee (e.g., Treasury Board) may serve as an appeal body, under a specific Act. It can be argued that, in such instances, the record of the decision, but not the advice and recommendations supporting it, should be publicly available. Often such decisions are communicated to the public. But there needs to be a general rule that such decisions are not to be treated as Cabinet confidences. Such a provision is made in both the British Columbia and Alberta FOI legislation.

Recommendation #13: That any exemption for Cabinet confidences include an exception for information in a record of decision made by Cabinet or one of its committees on an appeal under an Act of Parliament.

13. Disclosure with consent of Cabinet

There is a convention that the Prime Minister and former prime ministers control access to the Cabinet confidences of his or her administration. Ministers and former ministers control records relating to the making of government decisions or policy. The current federal policy provides discretion to the Cabinet or the Prime Minister to make a Cabinet confidence accessible to the public. The ministers concerned have discretion to disclose records used for, or reflecting communications or discussions regarding the making of government decisions or formulating of government policy.

In Ontario, paragraph 12(2)(*b*) recognizes that the Executive Council may lift the designation of Cabinet confidence from a record which has been prepared under its auspices. This consent is not a regular or normal practice. The Information and Privacy Commissioner of that province has recommended its use in cases where proposals or draft legislation or regulations have been released to some parties for consultation but access has been denied others because the records fall within the Cabinet confidences exemption. The commissioner believes that

this inequality of access can be rectified through the consent of the Executive Council. Other issues may arise where a Cabinet may wish to consent to the release of information qualifying as a confidence. The same requirements may occur for a minister or several ministers who have communicated over a government decision or formulation of policy. Since Cabinet, prime ministerial or ministerial consent does meet the current convention for the release of Cabinet confidences, it would seem appropriate to include a paragraph in the exceptions part of any proposed Cabinet confidences exemption which recognizes the process.

Recommendation #14: That any exemption for Cabinet confidences include an exception that it does not apply to any record where the Cabinet for which, or in respect of which, the record has been prepared consents to access being given.

14. Disclosure in the public interest

Disclosure in the public interest is a large and important access to information issue in and of its own right. It has become a feature of most modern access legislation in Canada and will have to be seriously considered in any reform of federal access legislation. Ontario was the first to include a more general "public interest override" in its freedom of information legislation. This override generally states that, despite any other provision of the Act, the head of a government institution must, as soon as practicable, disclose any record to the public or persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so. The disclosure requirement is extended to Cabinet confidences but the public interest is restricted to a record that reveals a grave environmental, health or safety hazard to the public. (*Ontario Freedom of Information and Protection of Individual Privacy Act*, section 11). The Ontario legislation also provides for a specific public interest override of several of its exemption provisions but Cabinet confidences is not included among these (section 23).

British Columbia and Alberta extend the basic Ontario provision by providing for release of information in cases where there is risk of significant harm to the environment or to the health or safety of the public, of an affected group of people or of a person or of the applicant or if there is any other reason for which disclosure is clearly in the public interest. (*British Columbia Freedom of Information and Protection of Privacy Act*, section 25 and *Alberta Freedom of Information and Protection of Privacy Act*, section 31).

There are few rulings under provincial access laws relating to the release of information in the public interest. Those which do, apply to protection of the environment, public health and safety. None relate to the public interest in the disclosure of Cabinet confidences. The best that can be said is that the public interest override is not leading to a flood of Cabinet confidences being released. There is, then, some comfort for those who may see such provisions as a major threat to the confidentiality of the Cabinet decision-making processes.

At the same time, it is hard to support the non-release of information, Cabinet confidence or not, which relates to either grave or significant harm to the environment, public health or safety or the disclosure of which was otherwise clearly in the public interest. The tests remain quite high and information which would fall in such categories should most often be made public or communicated to affected groups or individuals without any resort to an access request.

Recommendation #15: That any exemption for Cabinet confidences be subject to a general public interest override provision, preferably a section similar to those currently contained in the British Columbia and Alberta freedom of information and protection of privacy legislation.

15. Restrictions on examination and review of Cabinet confidences

It is common to recognize the special character of Cabinet confidences by restricting the number and level of those independent agents of Parliament who can gain access to them and examine and make orders concerning questions of public access to them. This is a wise procedure to reduce intrusions upon the overall principle of confidentiality for the deliberations of Cabinet.

The nature of any review mechanism is dependent, however, on the overall review structure under a reformed *Access to Information Act*. If it were to remain unchanged, with the commissioner carrying out an ombudsman's role for refusals of access, then the recommendations of the Standing Committee must be dealt with. The Committee recommended that the refusal of access to Cabinet confidences should not be referred to the Information Commissioner but rather should be reviewed directly by the Associate Chief Justice of the Federal Court. Such a procedure would be exceedingly confrontational and expensive, as well as place a very heavy workload on the Associate Chief Justice. There would seem to be merit in empowering the commissioner to investigate this type of refusal of access as is done in all other cases. The Information Commissioner should be bound, however, to restrict his or her delegation of powers of investigation, as is now the case for specific provisions relating to international affairs and defence under subsection 59(2) of the *Access to Information Act*. If an appeal is made to the Federal Court, it should be heard by the Associate Chief Justice as is also required under section 52 in maters of international affairs and defence.

Recommendation #16: That a provision be included in any amendment of the *Access to Information Act* which would restrict the delegation by the Information Commissioner of those charged with the review of refusals of access to Cabinet confidences to a limited number of officers or employees of the Office of the Information Commissioner and, where there is an appeal to the Federal Court, an amended Act must specify that the case will be heard by the Associate Chief Justice under the same terms as the current section 52 of the Act.

16. Suggested exemption provision for Cabinet confidences

Recommendation #17: That an amended exemption for Cabinet confidences should be drafted as follows:

1. The head of a government institution shall refuse to disclose any record the disclosure of which could reasonably be expected to reveal the substance of deliberations of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing:

   (*a*) an agenda, minute or other record of the deliberations or decisions of Council or its committees;

   (*b*) a record containing policy options or recommendations submitted, or prepared for submission, to Council or its committees;

   (*c*) a record used for or reflecting communications or discussions among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

   (*d*) a record prepared for the purpose of briefing a minister of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in (*c*) above;

   (*e*) draft policy or regulations; and

   (*f*) records that contain information about the contents of any record within the class of record referred to in paragraphs (*a*) to (*e*) if the information reveals the substance of the deliberations of Council.

2. Subsection (1) does not apply to:

   (*a*) a record that has been in existence for 15 or more years;

   (*b*) a record or part of a record which is a record of a decision made by Council on an appeal under an Act of Canada;

   (*c*) a record or part of a record, which does not contain policy options or recommendations and contains background explanations or analyses of problems submitted, or prepared for submission, to Council or its committees for their consideration in making a decision if:

      (i) the decision has been made public;

      (ii) the decision has been implemented; or

      (iii) four years or more have passed since the decision was made or considered;

(*d*) a record or part of a record attached to a Cabinet submission containing background explanations or analyses which were not brought into existence for the purpose of submission for consideration by Cabinet or one of its committees;

(*e*) a record or part of a record which contains a summary of a Cabinet decision exclusive of any information which would reveal the substance of deliberations of Council;

(*f*) any record or part of a record where the Cabinet for which, or in respect of which, the record has been prepared consents to access being given.

3. For purposes of subsections (1) and (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

Appendix A

The *Access to Information Act* and Cabinet confidences
A Discussion of New Approaches

Chart comparing Cabinet confidence provisions

Comparison of Cabinet confidence provisions

	Law or Proposal					
	A.T.I.A.	Ontario	Open and Shut	British Columbia	Alberta	Australia
Nature of Protection:						
Exclusion	yes	no	no	no	no	no
Exemption	no	yes	yes	yes	yes	yes
Mandatory	yes	yes	no, discretion	yes	yes	yes
Class test, records	yes	partial	partial	no	no	partial
Class test, reveal substances of deliberations	no	yes	yes	yes	yes	partial, one part
Injury	no	no	no	no	no	no
Cabinet covers	yes	yes	yes	yes	yes	yes
Committee covers	yes	yes	yes	yes	yes	yes
Records Protected:						
Memoranda and submissions	yes	yes	treat as advice and recommend-ations (discretion)	yes	yes	yes
Draft memoranda and submissions	yes	yes	treat as advice and recommend-ations (discretion)	yes	yes	treat as advice and recommen d-ations (discretion)
Discussion papers	yes, but not used now	n/a	n/a	n/a	n/a	n/a
Agenda	yes	yes	yes	yes	yes	yes
Minutes and records of decision	yes	yes	yes	yes	yes	yes
Communications among ministers to make government decisions or formulate	yes	yes	yes	yes	yes (background released after decision made public, implementati	treat as advice and recommen d-ations (discretion)

	Law or Proposal					
	A.T.I.A.	Ontario	Open and Shut	British Columbia	Alberta	Australia
government policy					on or five years)	
Ministerial briefings about matters before or are proposed to be brought before Cabinet	yes	yes	treat as advice and recommend-ations (discretion)	yes	yes	treat as advice and recommen d-ations (discretion)
Background explanations and analysis submitted or prepared for submission to Cabinet	yes	yes, until decision made and implemente d	yes, until decision made	yes, until decision made public, implement ed or after five years	yes, until decision made public, implemented or after five years	yes
Background explanations or analysis not prepared for Cabinet but attached to submission	no	no	no	no	no	no
Recommendation s and advice prepared outside Cabinet process but included in Cabinet document	no	no	no	no	no	no
Draft legislation	yes	yes	yes	yes	yes	yes
Draft regulations	yes	yes	yes	yes	yes	yes
Summary or communication device of Cabinet decisions	no	no	no	no	no	no
Records communicating Cabinet agenda or decisions internally	yes	yes	yes	yes	yes	treat as advice and recommen d-ations (discretion)
Records containing information about Confidences	yes, all reference s	yes, but only if reveals substance of deliberation s	yes, but only if reveals substance of deliberation s	yes, but only if reveals substance of deliberatio ns	yes, but only if reveals substance of deliberations	yes, but only if reveals substance of deliberatio ns

	Law or Proposal					
	A.T.I.A.	**Ontario**	**Open and Shut**	**British Columbia**	**Alberta**	**Australia**
List of records non-inclusive	yes	yes	yes	yes	yes	yes
Exceptions to Protection:						
Time limit	yes, 20 years	yes, 20 years	yes, 15 years	yes, 15 years	yes, 15 years	no
Background and analysis	no	yes, after decision made and implemented	yes, after decision made	yes, after decision made public, implemented or after five years	yes, after decision made public, implemented or after five years	no
Cabinet decision as appeal body	no	no	no	yes	yes	yes
Cabinet consent for specific disclosure	yes	yes	no	no	no	no
Public interest override	no	yes grave harm to environment, public health and safety	no	yes, general public interest (significant and clearly)	yes, general public interest (significant and clearly)	no
Restriction on Examination and Review	n/a	Information and Privacy Commissioner and Assistant Information Commissioner	Associate Chief Justice of Federal Court	Information and Privacy Commissioner	Information and Privacy Commissioner	no